Supreme Court U.S.
JAN 19 2010
OFFICE OF THE CLERK

No. 09-564

IN THE
Supreme Court of the United States

CITY COUNCIL OF THE CITY OF ALBUQUERQUE,
Petitioner,

v.

ALBUQUERQUE COMMONS PARTNERSHIP,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New Mexico

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

TACY F. FLINT
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000

CARTER G. PHILLIPS*
JONATHAN F. COHN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

ROBERT M. WHITE
CITY ATTORNEY
MARK HIRSCH
DEPUTY CITY ATTORNEY
CITY OF ALBUQUERQUE
P.O. Box 2248
Albuquerque, NM 87103
(505) 768-4657

Counsel for Petitioner

January 19, 2010 * Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI	1
I. THE QUESTIONS ARE PROPERLY PRESENTED FOR THIS COURT'S REVIEW	1
II. THIS COURT SHOULD RESOLVE THE DEEPENING SPLIT AS TO WHETHER ORDINARY LEGISLATIVE PROCESS SATISFIES FEDERAL DUE PROCESS REQUIREMENTS IN ZONING DECISIONS	4
III. THIS COURT SHOULD RESOLVE THE SPLIT AS TO WHETHER A PROPERTY OWNER IS ENTITLED TO § 1983 DAMAGES WITHOUT FIRST PURSUING STATE LAW REMEDIES FOR A DUE PROCESS VIOLATION IN ZONING CASES	9
CONCLUSION	12

TABLE OF AUTHORITIES

CASES Page

American Mfrs. Mut. Ins. Co. v. *Sullivan*, 526 U.S. 40 (1999) 5
Arnel Dev. Co. v. *City of Cosa Mesa*, 620 P.2d 565 (Cal. 1980) 7
Board of Regents of State Colls. v. *Roth*, 408 U.S. 564 (1972) 4
City of Eastlake v. *Forest City Enters., Inc.*, 426 U.S. 668 (1976) 6
Club Misty, Inc. v. *Laski*, 208 F.3d 615 (7th Cir. 2000) 5
Cormack v. *Settle-Beshears*, 474 F.3d 528 (8th Cir. 2007) 10
Cox Broad. Corp. v. *Cohn*, 420 U.S. 469 (1975) 1
Eacret v. *Bonner County*, 86 P.3d 494 (Idaho 2004) 7
Emmett McLouglin Realty, Inc. v. *Pima County*, 132 P.3d 290 (Ariz. Ct. App. 2006) 7
Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) 2
Hume v. *Franklin County Fiscal Court*, 276 S.W.3d 748 (Ky. 2008) 7
Jackson Court Condominiums, Inc. v. *City of New Orleans*, 874 F.2d 1070 (5th Cir. 1989) 6
McPherson Landfill, Inc. v. *Board of County Comm'rs*, 49 P.3d 522 (Kan. 2002) 7
Mercer v. *Theriot*, 377 U.S. 152 (1964) 2
Morrissey v. *Brewer*, 408 U.S. 471 (1972) 5
O'Neill v. *Town of Nantucket*, 711 F.2d 469 (1st Cir. 1983) 6

TABLE OF AUTHORITIES—continued

	Page
River Park, Inc. v. *City of Highland Park*, 23 F.3d 164 (7th Cir. 1994)	5, 10
Urie v. *Thompson*, 337 U.S. 163 (1949)	2
Williamson County Reg'l Planning Comm'n v. *Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)	9, 10
Zinermon v. *Burch*, 494 U.S. 113 (1990)	9

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

ACP's opposition cannot diminish the importance of the two questions presented in this case, both of which have divided federal and State courts. Neither question turns on State law or factual issues, as ACP suggests. To the contrary, whether federal due process requirements prohibit a local government from imposing a zoning change by ordinary legislative process, and whether a property owner may challenge such a zoning change and seek money damages under § 1983 without first pursuing state law remedies, are strictly federal questions that are properly presented in this case.

I. THE QUESTIONS ARE PROPERLY PRESENTED FOR THIS COURT'S REVIEW.

Contrary to respondent's specious arguments regarding jurisdiction and waiver, *see* BIO 12-13, 17-18, 26-27, the Court plainly can review both questions presented. ACP first suggests that ongoing proceedings in the State Supreme Court regarding post-judgment interest somehow affect this Court's review. BIO 12. Those proceedings, however, involve only a peripheral issue that is unrelated to either question presented. Where, as here, the relevant questions of federal law have been fully and finally determined in State court, and "[n]othing that would happen in the course" of the ongoing proceedings "would foreclose or make unnecessary decision on the federal question," this Court retains jurisdiction. *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 480 (1975).

ACP next asserts that the City "failed to preserve" the questions presented, BIO 13, 17-18. This is incorrect. As to the first question presented—

BEST AVAILABLE COPY

whether the City's use of legislative process in its zoning decision satisfied due process—the State Supreme Court already held in 2008 that "the City's decision" to provide ordinary legislative process "lacked procedural fairness and did not comport with due process of law." App. 76a (¶ 52); *see also* App. 64a, 71a-72a (¶¶ 33, 43). The City was thus not required, in order to preserve the question, to seek a *second* review of it in the State Supreme Court in 2009. *See Urie* v. *Thompson*, 337 U.S. 163, 171 (1949); *see also Mercer* v. *Theriot*, 377 U.S. 152, 153-54 (1964) (per curiam); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 257-58 (1916).

Nonetheless, ACP argues that the City somehow "waived" the issue by arguing in the Court of Appeals on remand that the State Supreme Court's decision should be construed as not requiring a quasi-judicial process. BIO 17-18. The court of appeals determined that the State Supreme Court had held that "ACP's right to due process had been violated." App. 3a (¶ 4). And, the court of appeals went on to hold that based on the City Council's "*ex parte*" contacts with the public, "the City Council was a biased tribunal" that could not provide ACP with adequate process. App. 19a-20a (¶¶ 31-32). Following that ruling, the City *again* sought State Supreme Court review on the due process issue. The City asked the State Supreme Court to determine whether the court of appeals had erred in "[e]quating *ex parte* contact normal to legislative proceedings with a disqualifying bias," Resp. App. 11a, and asserted that such normal legislative process "is simply not comparable to a complete failure to hold any hearing," as the court of appeals' opinion indicated, Resp. App. 23a. In short, the City sought State court review of its due process obligations at every possible opportunity.

As to the second question presented—whether ACP was entitled to damages under § 1983 without first pursuing available state remedies—ACP initially asserts that the issue is not properly before the Court. According to ACP, the court of appeals never held that ACP need not pursue state law remedies before obtaining § 1983 damages, and the City never sought any such decision. BIO 26-27. Both assertions are false.

First, the court of appeals squarely held "that ACP's Section 1983 action was not foreclosed by available state remedies." App. 27a-28a (¶ 43). *See also* App. 30a (¶ 46). What ACP ridicules as a "fantasy" holding, BIO 26, is in fact reality. Second, as the court of appeals recognized, the City argued that issue to the court. "[T]he City's second argument" to the court was that a property owner could not properly be permitted "'the unilateral option to cash in on any procedural flaw in an administrative proceeding by declining remand and pursuing a [Section] 1983 action.'" App. 26a (¶ 41) (alteration in original).

Moreover, when the court of appeals ruled against the City, the City sought further review in the State Supreme Court. The City asked for review of whether the Court of Appeals had erred in "[e]quating an administrative level procedural deprivation with a due process violation, when the state provided an appeal process capable of remediating the initial deprivation." Resp. App. 11a. The City argued that "[f]ederal jurisprudence in land use cases requires that all state remedies be pursued before resort to the United States Constitution," Resp. App. 21a; *see also* Resp. App. 20a ("right to a remand"), the same argument it is advancing here. *See, e.g.*, Pet. 21 ("plaintiffs challenging zoning decisions under the

Due Process Clause ... must pursue state law remedies"). The question was thus preserved.

II. THIS COURT SHOULD RESOLVE THE DEEPENING SPLIT AS TO WHETHER ORDINARY LEGISLATIVE PROCESS SATISFIES FEDERAL DUE PROCESS REQUIREMENTS IN ZONING DECISIONS.

The court below held that ordinary legislative process, which normally involves "contacts and influence" between legislators and the public, *see* App. 67a n.3 (¶ 36 n.3), violates constitutional obligations. App. 20a-21a, 27a-28a (¶¶ 32, 43). That decision contributed to an ongoing split recognized by the court of appeals. App. 27a (¶ 43). While numerous courts have broadly held that legislative process is constitutionally sufficient in zoning decisions, even when the zoning decision affects only one or a small number of property owners, Pet. 11-13, 15-17, other courts have concluded, like the court below, that enhanced or quasi-judicial process in which there are no "*ex parte* contacts" is required. Pet. 13-14. Attempting to obfuscate this important and divisive federal legal question, ACP raises a series of arguments, all of which miss the mark.

1. ACP first asserts that the decision below turned not on a disputed question of federal law, but on quirks of New Mexico state law, including New Mexico's recognition of a property interest in continued zoning rights. BIO 16-17, 24-25. ACP fundamentally misunderstands this Court's procedural due process jurisprudence. To be sure, whether a cognizable property interest exists is, in part, a matter of state law. *See Board of Regents of State Colls.* v. *Roth*, 408 U.S. 564, 570-71 (1972). The City accordingly does not seek review of the State court's decision in that regard. However, what process is

due under the Due Process Clause of the U.S. Constitution is undeniably a question of federal constitutional law. *See, e.g.*, *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972); *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 59 (1999).

ACP's related contention that differences in state law distinguish this case from the numerous cases cited in the City's Petition, BIO 19-23, is likewise incorrect. Indeed, the court of appeals itself expressly recognized that "other courts have concluded that minimal process is due under the Constitution in zoning cases," but it "[n]evertheless" chose to reach a different result. App. 27a (¶ 43) (citing *River Park, Inc.* v. *City of Highland Park*, 23 F.3d 164 (7th Cir. 1994)).

ACP now argues that the court of appeals "distinguished" the decisions of these "other courts," including *River Park*, based on the existence of a property interest under New Mexico state law. BIO 20. But the court of appeals did no such thing, *see* App. 27a (¶ 43), and no distinction exists. The Seventh Circuit in *River Park* expressly recognized that "River Park was entitled to due process of law" with regard to the zoning of its property (in other words, that River Park had a cognizable property interest), but nonetheless held that "the procedures 'due' in zoning cases are minimal," and satisfied by legislative action. 23 F.3d at 166.

The Seventh Circuit reiterated the point in *Club Misty, Inc.* v. *Laski*, 208 F.3d 615 (7th Cir. 2000). Although ACP claims that *Club Misty* supports its view that state law controls the inquiry as to what process is due, *see* BIO 20, that case actually makes clear that when the property interest in question is an interest in continued zoning, the process due is no more than the legislative process. 208 F.3d at 622

("zoning is on the legislative side of the legislative/judicial divide"). These cases directly contradict the holding below.

ACP's purported distinctions of the other cases cited in the City's Petition, *see* BIO 19-22, are similarly invalid. First, ACP wrongly asserts that the decision of the Fifth Circuit in *Jackson Court Condominiums, Inc.* v. *City of New Orleans*, 874 F.2d 1070 (5th Cir. 1989), rested on a finding under state law that there was "no constitutionally protected property interest at issue." BIO 20. That court instead stated that it "need not and [did] not address" the existence of a property interest because the legislative nature of the zoning proceeding foreclosed the plaintiff's procedural due process claim. 874 F.2d at 1074. ACP's assertion that the First Circuit's decision in *O'Neill* v. *Town of Nantucket*, 711 F.2d 469 (1st Cir. 1983), resulted from *state* procedural due process requirements, BIO 20, is also wrong: the court held that when normal legislative process had been provided by a zoning authority, "the parties who have been adversely affected have had all and perhaps more than all the procedural due process guaranteed to them *by the Fourteenth Amendment*." 711 F.2d at 472. The rulings of the other federal appellate cases cited in the petition for their approval of zoning changes made through ordinary legislative process were likewise not—as ACP argues, BIO 20-21, 23-24 (citing cases)—dependent on state law. Finally, ACP's attempt to distinguish *City of Eastlake* v. *Forest City Enterprises, Inc.*, 426 U.S. 668 (1976), on the ground that that decision "rests ... on a 'binding interpretation of state law' that upzoning was legislative in nature," BIO 22, fails for the same reason. Whatever form of process is provided under

state law must be measured against federal constitutional constraints.

Additionally, ACP's blanket assertion that state court cases addressing zoning are "irrelevant here because they rest on different state laws," BIO 21-22, is equally baseless. In the cases cited in the Petition, contrary to ACP's claims, the state courts established that they were addressing what process is due under *federal* law. *See McPherson Landfill, Inc.* v. *Board of County Comm'rs*, 49 P.3d 522, 531 (Kan. 2002) (claim at issue was that "the decision of the Board is void based upon a violation of MLI's due process rights under the United States Constitution"); *Arnel Dev. Co.* v. *City of Cosa Mesa*, 620 P.2d 565, 571 (Cal. 1980) (expressly holding that rezoning by "legislative act, thus permitting its enactment by initiative, does not violate the federal Constitution"); *Emmett McLouglin Realty, Inc.* v. *Pima County*, 132 P.3d 290, 294 (Ariz. Ct. App. 2006) (addressing "due process afforded by the United States and Arizona Constitutions"); *Eacret* v. *Bonner County*, 86 P.3d 494, 498 (Idaho 2004) (stating, *e.g.*, that "[t]he Due Process Clause entitles a person to an impartial and disinterested tribunal," and citing decisions of this Court and the Ninth Circuit); *Hume* v. *Franklin County Fiscal Court*, 276 S.W.3d 748, 752 (Ky. 2008) (relying, in review of "procedural due process" claim, on *Mathews* v. *Eldridge* analysis set forth in prior Kentucky Supreme Court decision).

While ACP asserts that the City seeks to "Federaliz[e] zoning law and procedures to impose 'national uniformity,'" BIO 16, the contrary is true. It is the decision below that improperly federalizes zoning law; the holding under review is that the federal Constitution requires local governments to provide quasi-judicial process.

2. ACP also contends that this case does not involve ordinary legislative process and thus does not permit the Court to review whether such process satisfies the Fourteenth Amendment. BIO 2-3, 24-25. ACP misconstrues the State Supreme Court's ruling. The State Supreme Court found that the process provided here amounted to "normal legislative functioning." App. 67a n.3 (¶ 36 n.3). In reviewing the so-called "*ex parte*" contacts between a City Councilor and citizen that took place when the City Council was enacting the 1995 Uptown Sector Plan ("1995USP"), the court concluded that "[s]uch contacts and influence are common and appropriate in the *normal legislative functioning* of a city council." *Id.* (emphasis added).

ACP nonetheless asserts that the process provided by the City Council was not ordinary legislative action because only a small number of property parcels were affected by the zoning change. BIO 2, 24. But this argument conflates the *process* provided by the City with the *outcome* of the process. Here, the City provided ordinary legislative process, in which legislators voted on a zoning change that had prospective effect, even though the scope of the legislation was narrow. The State Supreme Court held that the narrow scope meant that quasi-judicial process was required. *See* App. 64a (¶ 33) ("when a zoning authority initiates a proposal to downzone a particular property, the zoning authority must afford enhanced procedural protections" and "must act like a judicial body"); *see also* App. 69a (¶ 39) (concluding that "action is quasi-judicial, not legislative"); App. 64a-65a, 71a-72a, 76a (¶¶ 34, 43, 52). But the court did not hold that the process actually provided was anything but legislative in nature.

3. Finally, ACP argues that "[t]he City does not challenge the Court of Appeals' analysis under *Mathews* [v. *Eldridge*, 424 U.S. 319 (1976)]." BIO 23. That argument is correct, but beside the point. The City's position is that no *Mathews* analysis was necessary because, as both State and federal courts have held, zoning changes satisfy federal due process requirements if they are undertaken by legislative process. Pet. 11-13, 15-17. The court of appeals' finding that ACP was further entitled to a tribunal that had no "actual ex parte contact," App. 20a (¶ 32), directly conflicts with these holdings.

III. THIS COURT SHOULD RESOLVE THE SPLIT AS TO WHETHER A PROPERTY OWNER IS ENTITLED TO § 1983 DAMAGES WITHOUT FIRST PURSUING STATE LAW REMEDIES FOR A DUE PROCESS VIOLATION IN ZONING CASES.

1. ACP further obfuscates the question before this Court by conflating the requirement that a property owner seek state law remedies before filing a § 1983 action with prudential "ripeness" and "exhaustion" doctrines. BIO 27-29. The pursuit of state law remedies does not merely aid interests in finality and reviewability, as ACP suggests. To the contrary, it is a necessary element of the claim of a due process violation. A "constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete *unless and until the State fails to provide due process.*" *See Zinermon* v. *Burch*, 494 U.S. 113, 126 (1990) (emphasis added).

The process due in zoning cases is minimal and satisfied by post-deprivation proceedings because, as this Court made clear in *Williamson County Regional Planning Commission* v. *Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), the Constitution grants to

the states the broad authority to take property for public use without providing prior or even contemporaneous compensation. *Id.* at 194. Drawing on this principle, the Eighth Circuit explained that a failure to provide pre-deprivation process in a zoning case "does not offend the federal Constitution, ... because 'a sovereign vested with the power of eminent domain may exercise that power consistent with the constitution without providing prior notice, hearing or compensation so long as there exists an adequate [postdeprivation] mechanism for obtaining compensation.'" *Cormack* v. *Settle-Beshears*, 474 F.3d 528, 531-32 (8th Cir. 2007) (alteration in original). If a § 1983 claimant cannot show that a state "lacks an adequate postdeprivation mechanism to provide him with just compensation for the alleged taking, his due process claim must fail." *Id.* at 532. *See also River Park*, 23 F.3d at 167.

Because the Constitution requires that a local government provide no more than *post-deprivation* process when regulating land use, there can be no failure to provide all the process that is due until the local government has been given the opportunity to provide such process. The City had no such opportunity here. And, if a local government's procedural error in implementing a zoning change exposes the government to millions of dollars in liability without any opportunity to remedy the error, then local governments—admittedly fallible institutions—will experience a dramatic chilling effect in the regulation of land use.

2. Finally, ACP asserts that these principles do not apply here, because ACP purportedly did seek certain relief in the state courts. BIO 30-32. Although ACP suggests the existence of a material factual dispute on this question, BIO 31, that is

incorrect. Of controlling significance is that once the State courts concluded that the process provided by the City was constitutionally inadequate, the courts permitted the City *no opportunity* to consider the 1995USP using the purportedly required quasi-judicial process. The court should have remanded but did not.

ACP's recitation of the factual record is highly misleading. ACP states that the reason the district court did not remand the zoning decision to the City is that the court found "*on the merits*, that the City failed to prove downzoning criteria" under state law. BIO 31. But the City did not attempt and fail to "prove downzoning criteria" as ACP suggests. Rather, the City argued that it was not required to meet those criteria—which apply only when there is a quasi-judicial review of a downzoning—because the City had properly enacted the 1995USP by legislative process. App. 67a (¶ 37). Once the State court ruled that a quasi-judicial process was required, the court should have allowed the City to conduct that process.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

TACY F. FLINT
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000

CARTER G. PHILLIPS*
JONATHAN F. COHN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

ROBERT M. WHITE
CITY ATTORNEY
MARK HIRSCH
DEPUTY CITY ATTORNEY
CITY OF ALBUQUERQUE
P.O. Box 2248
Albuquerque, NM 87103
(505) 768-4657

Counsel for Petitioner

January 19, 2010

* Counsel of Record